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No. 94-1629

In The

Supreme Court of the United States

October Term, 1994

DANIEL M. TABAS, JOSEPH P. CAMPBELL, JAMES J. McSWIGGAN, LEE A. TABAS, ROBERT TABAS, SUSAN TABAS TEPPER, LINDA TABAS STEMPEL, JOANNE TABAS WURZAK, CAROL TABAS STOFMAN and HOWARD WURZAK,

Petitioners,

vs.

HARRIETTE S. TABAS, RICHARD S. TABAS, NANCY C. TABAS and GERALD LEVINSON, as Executors of the Estate of Charles L. Tabas,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' OBJECTION TO THE "MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER"

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6 pp

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' OBJECTION TO THE MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Respondents, plaintiffs below (hereinafter "plaintiffs"), respectfully object to and oppose the Motion for Leave to File Brief *Amicus Curiae*, filed on behalf of the American Institute of Certified Public Accountants (hereinafter "the Institute"). The Institute advances two principal reasons in support of its motion, neither of which warrants the grant of said motion.

First, the Institute claims that its interests and the interests of its members "arise from the fact that accountants,

like attorneys and other legitimate businesspersons, increasingly find themselves the target of civil RICO claimants alleging mail, wire, and security fraud[,]" and that the "Third Circuit's sharply divided *in banc* decision below .... will invite even more vexatious civil RICO litigation against accountants and other legitimate businesspersons." However, this Court has already protected the legitimate interests of "outside" accountants who do not participate in the operation or management of the enterprise itself when, in *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1173 (1993), this Court held such individuals to be outside the reach of RICO. In an Institute publication, the JOURNAL OF ACCOUNTANCY, the Institute specifically advised its members (including, significantly, members of the national accounting firm of Price Waterhouse, whose financial reports in this case contributed significantly to the Third Circuit's *in banc* determination that plaintiffs had provided proof that defendants engaged in a pattern of racketeering activity), about *Reves*, stating:

> RICO: THE THREAT IS LIFTED
> *How should CPAs proceed now that the danger of liability arising from the Racketeer Influenced and Corrupt Organizations Act (RICO) seems to have subsided?* [Italics in original.]
>
> For a long time, CPAs have been concerned about lawsuits brought under RICO. Under the federal RICO statute, CPAs and other professionals who are only indirectly associated with a troubled entity can be held liable for massive damages and be implicated in "a pattern of racketeering activity."
>
> Fortunately, as this article demonstrates, recent case law shows a trend to dismiss RICO claims

against outside accountants (and other professionals) who did not participate in the management or operation of the companies to which they provided services. As a result, CPAs can take a different approach to RICO lawsuits.

THE IMPORTANCE OF *REVES*

At the forefront of this trend is the U.S. Supreme Court decision in *Reves et al. v. Ernst & Young.... The decision effectively protects outside professionals, such as accountants, against RICO liability.*

* * *

In light of the recent trend discussed above, perhaps the burdensome lawsuits containing RICO claims against accountants will decrease. However, even if such lawsuits continue, *CPAs can rest assured that the threshold requirement of "participation in an enterprise's operation and management," established by the Supreme Court, creates a major obstacle to their liability.*

JOURNAL OF ACCOUNTANCY, October 1994, at 119–22 (emphasis added). Significantly, the Third Circuit expressly followed *Reves* when it affirmed the grant of summary judgment for Peat, Marwick, Main & Company on a RICO claim based on false and misleading financial statements prepared by Peat Marwick, as an outside auditor, for an insolvent insurance company. *The University of Maryland at Baltimore v. Peat, Marwick, Main & Co.*, 996 F.2d 1534, 1538–40 (1993). Given this Court's decision in *Reves* and the Third Circuit's decision in *Peat, Marwick*, and inasmuch as the Third Circuit's *in banc* opinion below in no way implicates the legitimate conduct of outside accountants, the Institute's motion to file a brief *amicus curiae* should be denied.

Second, the Institute claims that the Third Circuit's *in banc* decision below "conflicts with the Third Circuit's prior precedent, as well as with the approaches taken by the other circuits." As stated in the Brief in Opposition to the Petition for a Writ of Certiorari (hereinafter "Brief in Opposition"), the decision below does not conflict with the Third Circuit's prior decisions and, even if it did, that would be irrelevant because this case is a decision of the Third Circuit *in banc* and any prior "conflicting" decisions were panel decisions only. Brief in Opposition at 20–21. When the Third Circuit sitting *in banc* states the law of that circuit, its ruling takes precedent over prior inconsistent panel decisions and settles the law of the circuit. Further, and as also detailed in the Brief in Opposition, there is no real or irreconcilable conflict between the Third Circuit's decision in this case and the decisions from other circuits cited by petitioners to support such a conflict. Brief in Opposition at 13–20. Given its flawed argument regarding the issue of "conflict," the Institute's motion for leave to file a brief *amicus curiae* should be denied.

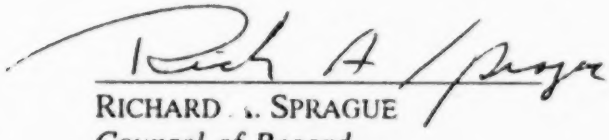
The Institute's motion should also be denied since its proposed brief in support of the grant of a writ of certiorari makes clear that the Institute, like petitioners, would have this Court engage in a judicial "amendment" of RICO under circumstances where Congress has considered but not enacted the very amendments sought by petitioners. *See* Brief in Opposition at 23–27.

In sum, the Institute has failed to establish that it or its members have any *bona fide* reason to inject themselves into this litigation as *amicus curiae*. The concerns expressed by the Institute in its motion (as well as in its proposed brief in support of this Court's exercise of certiorari jurisdiction) have been squarely and adequately addressed and protected by this Court's decision in *Reves*, and/or by the petition for a writ of

certiorari filed in this matter. For these reasons, respondents withheld their consent to the Institute's request to file a brief as *amicus curiae*.

Respondents respectfully request that the Motion for Leave to File Brief *Amicus Curiae*, filed on behalf of the American Institute of Certified Public Accountants, be denied.

Respectfully submitted,



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